



**The Comptroller General  
of the United States**

Washington, D.C. 20548

## Decision

**Matter of:** United Rigging & Hauling, Inc.  
**File:** B-239416  
**Date:** August 28, 1990

Robert F. Condon, Esq., Sachs & Tayler, for the protester.  
Christopher M. Kerns, Esq., for Fort Myer Construction Corporation, an interested party.  
Robert E. McCally, Esq., and Talbot J. Nicholas II, Esq., Pennsylvania Avenue Development Corporation, for the agency.  
Robert C. Arsenoff, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Head of agency reasonably determined to permit correction of awardee's bid based on a claim of mistake since the evidence submitted establishes the existence of a mistake, the manner in which it occurred, and the intended price.
2. Agency head vested with authority to correct mistakes in bid is not bound by contrary recommendations of contracting officer, nor is their disagreement reflective of a lack of clear and convincing evidence as determined by an independent consideration of the matter by the agency head.

### DECISION

United Rigging & Hauling, Inc. protests the award of a contract to Fort Myer Construction Corporation under invitation for bids (IFB) No. PI-89-005a-821, issued by the Pennsylvania Avenue Development Corporation (PADC) for a public improvement project adjoining the Federal Bureau of Investigation (FBI) headquarters in Washington, DC. The protester argues that PADC improperly allowed an upward correction in Fort Myer's bid price because the evidence submitted in support of the firm's claimed mistake in bid was not clear and convincing.

We deny the protest.

Seven bids in response to the IFB were opened on Thursday, March 22, 1990. Fort Myer submitted the apparent low bid

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at \$1,042,000; United was next at \$1,448,000. Five other bids were higher than the government estimate of \$1,497,000, ranging in price from \$1,567,994 to \$1,998,000. The next morning, on Friday, March 23, the contracting officer, suspecting a mistake in the bid, called Fort Myer for verification; by shortly after 1 p.m., Fort Myer called PADC and informed the contracting officer that its bid should have been \$1,402,000 rather than \$1,042,000, but due to a clerical error the wrong figure appeared on the bid form. Fort Myer was requested to submit a letter with supporting documentation concerning the alleged mistake; this material was telefaxed to PADC at the contracting officer's request later that same day.

On the following Monday, March 26, and continuing through April 5, PADC requested additional information from Fort Myer, including originals of the documents which had been telefaxed on the preceding Friday and affidavits from those knowledgeable of the events surrounding the claimed mistake. On April 6, PADC staff met personally with the firm's executive vice president who explained the mistake and offered to perform at the price actually bid in the event that correction was not permitted. On April 9, the contracting officer recommended against correction. On April 10, the contracting officer's supervisor wrote a memorandum disagreeing with the April 9 position; and, on April 16, after reviewing all of the evidence presented, including the contracting officer's recommendation, PADC's executive director approved the correction with the concurrence of counsel. PADC met with United (who was given an opportunity to briefly review the evidence presented by Fort Myer in support of its mistake claim) and explained its decision. On April 25, Fort Myer was awarded a contract at the adjusted price of \$1,402,000.

In its protest, United challenges the evidence presented as containing contradictions and as otherwise inherently incredible with respect to how and why the purported clerical error occurred, and to length of time it took Fort Myer to discover the mistake, to inform PADC of it, and to provide supporting evidence. United also argues that, in combination with its other contentions, and the fact that the contracting officer recommended against correction, the executive director erred in his determination to permit correction for lack of "clear and convincing evidence."

A bidder who seeks upward correction of its bid prior to award must submit clear and convincing evidence showing that a mistake was made, the manner in which the mistake occurred, and the intended price. The closer an intended bid is to the next low bid the more difficult it is to

establish that it is the bid actually intended. Since the authority to correct mistakes alleged after bid opening but prior to award is vested in the head of a procuring agency, and because the weight to be given to the evidence in support of an asserted mistake is a question of fact, we will not disturb an agency's determination to correct unless there is no rational basis for the decision. Vrooman Constructors, Inc., B-226965.2, June 17, 1987, 87-1 CPD ¶ 606.

We have reviewed the evidence, including Fort Myer's workpapers and affidavits, considered by PADC and, for the reasons set forth below, we find that PADC's executive director had a clear and convincing basis to conclude that Fort Myer had established the existence of a mistake, the manner in which it was made, and its intended price of \$1,402,000.

The evidence shows that on the day before bid opening Fort Myer received a telefaxed unpriced quotation from Kingston Constructors, Inc. detailing what services it would perform as an electrical subcontractor on the FBI project; the communication further invited a telephone contact for further information. An affidavit in support of Fort Myer's claim states that a last minute subcontractor bid was received by telephone on March 22 which caused the firm's estimator to have to refigure the lump-sum bid price downward. After the estimator arrived at the new bid price figure, he states that he telephoned a company secretary who typed a figure on a presigned bid form and dispatched the bid to PADC about 15 minutes before opening. The estimator and Fort Myer's executive vice president both state that the estimator was not made aware of the bid opening results until about 5 p.m.--3 hours after opening. The estimator states that that evening he discovered that there was an error between the \$1,402,000, which he believed he told the secretary over the phone, and the \$1,042,000 typed on the bid as submitted.

On the morning of Friday, March 23, the estimator states that he looked on the secretary's desk and realized that there had been a communication problem the day before. In response to a request for verification that morning from PADC, the estimator admits that, for fear of repercussion since he did not know exactly who had made the error, he "stall[ed]" by saying that he was still checking into the matter. By 1 p.m., however, after being reassured by the company executive vice president that the proper course of action was to immediately contact PADC with his findings and that there would be no repercussions as the estimator had feared, the estimator contacted the contracting officer and

made arrangements to prepare a letter with supporting documents to be sent to the agency. As indicated above, they were received by telefax before 5 p.m. The executive vice president's affidavit states that he interviewed the secretary who denied that she had made a typing mistake.

The originals of the documents telefaxed on March 23 were received at PADC the following week. (Contrary to United's suggestion, they are identical to the faxed documents). The cover work sheet shows a reduction in the originally calculated bid price by virtue of an unnamed electrical subcontractor bid of \$331,000 to a "bottom line" bid figure of \$1,402,378, which was then rounded to \$1,402,000. Also, the "Comparison Sheet" logging electrical subcontractor bids received contains an entry for "Kingston" indicating it was received by telephone in one of the final columns at a price of \$331,000--the same figure that Fort Myer claims it used to recalculate the final intended bid price that appeared on the cover work sheet. By affidavit, the estimator certified that the documents provided to PADC were the papers he used on March 22 to calculate the bid.

United's principal objection to the description of events set forth above is that the protester simply does not believe that the awardee actually received a last minute quotation from Kingston and that therefore the bid work sheets do not, in fact, support the amount of the claimed intended bid. As a result, the protester believes that, without more, the agency had an insufficient basis for permitting correction. Accordingly, United questions all of the estimator's account of events.

In our view, clear and convincing evidence supports PADC's findings that a mistake was made and that the intended bid was \$1,402,378 notwithstanding the protester's objections. There is no evidence in support of the protester's suggestion that Kingston did not supply a last minute price quotation. In contrast, the certified workpapers do contain evidence consistent with the estimator's account of events to the effect that Kingston priced the job after it had submitted an unpriced quotation to Fort Myer the night before opening. The workpapers are otherwise in good order, contain no discrepancies, and show clearly that \$1,402,378 was the result of all of the calculations.

Moreover, we find no basis for concluding that PADC acted unreasonably in assessing the rather forthcoming accounts of what transpired within Fort Myer's firm after the mistake was discovered. The estimator admits that he was initially concerned about repercussions which led to his reluctance on the morning of March 23 to blame a particular individual

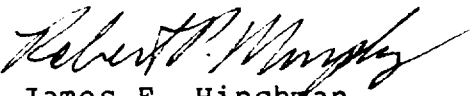
for what he had just discovered to be a transpositional error owing to imperfect telephonic communication. In this regard, we also find that PADC had a reasonable basis not to view the secretary's refusal to accept blame for the error as a sufficient basis to deny the claim for mistake; as the executive vice president's affidavit states, he interviewed both employees at PADC's request and, as a result, concluded that one of them had made the error but that neither believed that he/she was the one. Finally, the record simply does not support United's speculation that Fort Myer delayed, for some unstated improper purpose, in transmitting evidence to PADC after it confirmed the existence of the transpositional error.

As to the quality of the evidence itself, the existence of the mistake is supported by the disparity between Fort Myer's actual bid price, the government's estimate and the other prices received, and by the workpapers and affidavits. Likewise, the manner in which the mistake occurred, while not detailing precisely who committed it, is evidenced in three affidavits from Fort Myer which are all reasonable on their faces. Finally, the intended price is supported by the workpapers submitted along with the affidavits. Thus, in our view, PADC's conclusion that the bid should be corrected was proper, notwithstanding the speculation of United to the contrary. Vrooman Constructors, Inc., B-226965.2, supra, and notwithstanding that as corrected Fort Myer's bid is within 3 percent of United's bid. Conner Brothers Constr. Co., Inc., B-228232.2, Feb. 1, 1988, 88-1 CPD ¶ 103.

Finally, we do not agree with United's contention that the fact that PADC's contracting officer and its executive director could differ as to their interpretation of the data submitted by Fort Myer demonstrates that the evidence is not clear and convincing. The regulations vest the authority to correct mistakes with the head of the agency. Federal Acquisition Regulation (FAR) § 14.406-3(a). In this case, PADC's executive director made the decision. The contracting officer's recommendation not to permit correction in no way binds the executive director nor is it reflective of a lack of clear and convincing evidence as determined by his independent consideration of the evidence. 53 Comp. Gen. 232 (1973). Moreover, we have reviewed the

comparative positions of the contracting officer and the executive director and, as our analysis indicates, we find the findings of the agency head to be reasonable.

The protest is denied.

  
for James F. Hinchman  
General Counsel